Supreme Court, U.S.
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No. 99-1743

IN THE

Supreme Court of the United States

PATRICK BUCKLEY,

Petitioner,

v.

CITY OF PORTAGE; RICHARD J. WHITE, Chief of Police, Individually and in his official Capacity as Chief of Police of the Portage Police Department, Jointly and Severally; MICHAEL L. STAMPFLER, City Manager, Individually and in his capacity as Portage City Manager, Jointly and Severally,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

WHETHER THE COURT OF APPEALS PROPERLY APPLIED THE LAW IN CONCLUDING THAT THE PETITIONER'S SPEECH DID NOT ADDRESS A MATTER OF PUBLIC CONCERN WHERE JUDGED BY THE CONTENT AND THE CONTEXT THE PRIMARY FOCUS OF THE SPEECH WAS ON EMPLOYEE GRIEVANCE AND DEPARTMENT POLICY AND PROCEDURES?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Cited Authorities	iii
Statement of the Case	1
Reasons for Denying the Writ	3
The Petition For Writ Of Certiorari Should Be Denied Because The Court Of Appeals Correctly Applied The Relevant Case Law And The Decision Is Consistent With Prior Decisions Of The Sixth Circuit.	3
Conclusion	10

TABLE OF CITED AUTHORITIES

Page

Cases:

Barnes v. McDowell, 848 F.2d 725 (6th Cir. 1988) .. 4, 9

Chappel v. Montgomery County Fire Protection District No. 1, 131 F.3d 564 (6th Cir. 1997) ... 9

Connick v. Myers, 461 U.S. 138, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983) 4, 5, 9

Pickering v. Board of Education, 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968) 4

Rahn v. Drake Center, Inc., 31 F.3d 407 (6th Cir. 1994) 4, 7, 8

Thompson v. Scheid, 977 F.2d 1017 (6th Cir. 1992) . 9

Statute:

42 U.S.C. § 1983 2

United States Constitution:

First Amendment 3

STATEMENT OF THE CASE

The Petitioner, Patrick Buckley, is a police officer who has been employed by the City of Portage Police Department for 25 years. Over a period of five years, beginning in 1992, Petitioner anonymously published 81 issues of a newsletter, The Lookout, that often criticized police department officials and policies. The publication of issues 80 and 81 of The Lookout in March of 1997 led to the suspension of Petitioner for 20 days for violating departmental regulations.

Issue 80, published on March 5, 1997, included articles entitled "Committees" and "Rules Change Again". The two articles criticized Police Chief Richard White's policy of paying overtime for officers attending committee meetings and not for officers on street patrol duties. One article remarked that "the citizens of Portage are getting shortchanged".

Issue 81, published on March 11, 1997, contained articles entitled "Integrity: Part Deux", "Integrity: My Ass", and "Open Letter to Chip". The article entitled "Open Letter to Chip" repeated Petitioner's criticism of the policy regarding overtime, indicating that overtime pay had been approved for a physical fitness testing program. The article points out that due to the unavailability of overtime pay for officers on street patrol duties, the Department has only four officers to patrol the streets.

Issue 81 also contained a report of a deputy police chief's alleged mishandling of a purse retrieved from a fire scene. Additionally, Issue 81 contained an article asserting that the Department failed to follow proper procedures in hiring a female officer and suggesting that the officer was hired because she was a friend of a deputy chief.

The publication of the two issues of the Lookout led to two internal investigations. Chief White retained an independent investigator to look into the alleged mishandling of the purse at the fire scene. It was established that the deputy chief took possession of the purse at the direction of the fire chief. Upon returning to the police station, the deputy chief handed the purse to a junior officer for safekeeping. The junior officer placed the purse in a file cabinet and forgot about it. The officer went on off-duty for three days. When he returned to work, the officer remembered the purse and turned it over to another officer.

The deputy chief was exonerated by the independent investigator who concluded that the deputy chief had fulfilled his duty by turning the purse over to a junior officer.

The second internal investigation was to determine whether the junior officer had acted properly in handling the purse. The investigation resulted in the disciplining of the two officers for failure to follow proper procedures for safeguarding property.

These investigations confirmed the chief's suspicion that Petitioner was the author of The Lookout. Chief White therefore decided to suspend Petitioner for 20 days for insubordination and criticism of department officials and policies and for spreading rumors and gossip in violation of department regulations.

As a result of his suspension, the Petitioner brought this action under 42 U.S.C. § 1983 asserting, inter alia, that his suspension was in retaliation for the exercise of his First Amendment rights. The United States District Court for the Eastern District of Michigan denied Defendants' Motion for

Summary Judgment on grounds of qualified immunity. The Court of Appeals reversed, holding that the articles in question did not address matters of public concern and therefore Petitioner was not constitutionally protected from the adverse employment action taken against the Petitioner by Chief White.

REASONS FOR DENYING THE WRIT

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE COURT OF APPEALS CORRECTLY APPLIED THE RELEVANT CASE LAW AND THE DECISION IS CONSISTENT WITH PRIOR DECISIONS OF THE SIXTH CIRCUIT.

Pared to its essence, the Petitioner's argument is that the Court of Appeals erroneously determined that the Petitioner's speech did not address a matter of public concern and thus, was not protected under the First Amendment. The Petitioner contends that the present case is an example of the Court's confusing concepts about employee speech protection under the First Amendment, thereby leading to inconsistent decisions. Petitioner bases his argument on a misinterpretation of the holding of the Court of Appeals. Contrary to Petitioner's assertion, the Court of Appeals did not resolve "the factual issue of whether the disruption to the City outweighed the Petitioner's right to publish the speech." The Court of Appeals also did not conclude, as claimed by Petitioner, that "only a portion of the speech was directed at matters of public concern."

The law is clear that the threshold inquiry is whether the speech that Plaintiff cites as a basis for his suspension may be fairly characterized as constituting speech on a matter

of public concern. *Rahn v. Drake Center, Inc.*, 31 F.3d 407, 411 (6th Cir. 1994). If the Plaintiff's speech did not address a matter of public concern, no further inquiry is necessary. *Id. See also Barnes v. McDowell*, 848 F.2d 725, 733 (6th Cir. 1988). The *Pickering* balance, which Petitioner alludes to here, is only triggered when the Court finds that any part of the speech relates to matters of public concern. *Id.* Thus, in the instant case, since the Court of Appeals did not determine that a portion of Petitioner's speech addressed a matter of public concern, the Court did not proceed to consider the issue of whether the disruption to the City outweighed the Petitioner's right to publish the speech.

The Court of Appeals did not commit any legal error which warrants a review by this Court. The Supreme Court in *Connick v. Myers*, 461 U.S. 138, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983) provided guidance for determining whether a public employee's speech addressed a matter of public concern. The *Connick* Court held that

> when a public employee speaks not as a citizen about matters of public concern, but instead as an employee about matters only of personal interest, absent the most unusual circumstances, the Federal Court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.

Id. at 147.

The Court in *Connick* also instructed that in determining whether the speech addressed a matter of public concern,

the Court must consider the content, form and context of the speech as revealed by the whole record. *Connick*, 461 U.S. at 147-48.

After a review of the content and context of the articles published by Petitioner in The Lookout, the Court of Appeals correctly concluded that Plaintiff was speaking "not as a citizen about matters of public concern, but instead as an employee about matters only of personal interest."

The Court of Appeals first examined the articles entitled "Committees", "Rules Change Again", and "Open Letter to Chip" which criticized Chief White's establishment of numerous committees as his style of management, allocation of funds for overtime pay for officers attending committee meetings and not for officers performing street patrol duties, and correctly concluded:

> A close review of the content of these articles reveals that their primary focus is on the inavailability of overtime pay for patrol officers, not on the effects that the lack of such pay may have on the citizens of Portage . . . When Mr. Buckley's articles are read in context, it is clear that his complaints center on Chief White's allocation of department funds for overtime pay. This is a matter of workplace concern, but in and of itself it is not a matter of public concern. See *Barnes v. McDowell*, 848 F.2d 725, 734 (6th Cir. 1988) ("The mere fact that public monies and government efficiency are related to the subject of a public employee's speech do not, by themselves, qualify that speech as being addressed to a matter of public concern.") Buckley does

> comment that the citizens of Portage are getting short-changed, but he does so only after noting that fewer patrol officers on the street means that only half the officers can take a lunch break. The passing reference to the citizens of Portage . . . is not enough to transform a beef about internal department funding allocations into comment on a matter of public concern.

With regard to the articles entitled "Integrity: Part Deux" and "Integrity: My Ass," which deal with the deputy chief's alleged mishandling of the purse, his failure to follow proper internal procedure in hiring a female officer and his alleged lack of integrity, morals, and scruples, the Court of Appeals was correct in concluding that:

> Although we are mindful that complaints of corruption and illegal behavior are matters of public concern, we do not believe that every slighting reference by a government employee to an alleged lack of character and indifference to internal operating rules on the part of the top brass amounts to a matter of public concern. As the Supreme Court reasoned in *Connick v. Myers*,
>
> > To presume that all matters which transpire within a governmental office are of public concern would mean that virtually every remark — and certainly every criticism directed at a public official — would plant the seed of a constitutional case. While as a matter of good judgment, public officials should be receptive to constructive

> criticism offered by their employees, the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs. 461 U.S. at 149.

> Mr. Buckley's unflattering view of the integrity, morals, and scruples of the deputy chief — even when supported with examples of the deputy chief's alleged failings — is a personal matter, not a public one. We are simply not persuaded that Mr. Buckley's expressions of disdain for his superiors meet the constitutionally mandated "public concern" test."

The Court of Appeals' decision in this case is consistent with its earlier decision in *Rahn*, *supra* which addressed an analogous situation. In *Rahn*, plaintiff was discharged following a press release by the committee of which she was the chair. The press release was highly critical of the new administration of the public hospital where she worked as a nurse. After complaining about misspending of public money, the press release in one paragraph talked about patient endangerment as follows:

> New work rules which have caused widespread discontent among the hospital staff which has created a high absenteeism, possibly developing a patient endangerment situation.

The plaintiff contended that because the press release commented on how public monies were being spent and also mentioned patient endangerment, it was addressing matters of public concern. Rejecting plaintiff's contention, the Court in *Rahn* reasoned:

> Here, the *fact that [the plaintiff] believed that the money was not being spent in a wise fashion, by itself, is insufficient to find that the press release addressed a matter of public concern. In addition, the reference to "patient endangerment" does not make this a matter of public concern under the facts of this case.* The only mention of patient endangerment in the press release is located in the following paragraph: "New work rules which have caused widespread discontent among the hospital staff which has created a high absenteeism, possibly developing a patient endangerment situation." [sic] *The focus of this comment is not on patient endangerment arising from the misapplication of tax dollars; rather, the focus is on the employee's discontent with new work rules which might lead to a patient endangerment situation.* This is "nothing more than an example of the quintessential employee beef: management has acted incompetently". 31 F.3d at 412-13.

(Emphasis added).

As with the press release in *Rahn*, *supra*, the focus of the articles entitled "Committees", "Rules Change Again", and "Open Letter to Chip", is on Chief White's management style of establishing committees and allocation of funds for overtime pay, which are clearly the concern of employees and not public concern even though they may be of interest to the public. The focus is not on the effect the alleged improprieties would have on the citizens of Portage. Petitioner merely used the reference to the citizens of Portage to bolster his argument in support of allocation of overtime

pay for road patrol officers. Moreover, just because public money is involved does not warrant the characterization of the speech as related to matters of public concern. *Barnes, supra.*

The Court of Appeals' decision in *Chappel v. Montgomery County Fire Protection District No. 1*, 131 F.3d 564 (6th Cir. 1997) relied upon by Petitioner is distinguishable in a material respect. In *Chappel, supra*, the alleged mismanagement of public funds was linked to corruption, which has been held to be a matter of public concern deserving of constitutional protection. However, in the present case, Petitioner presented no evidence of corruption.

The articles entitled "Integrity: Part Deux" and "Integrity: My Ass" discuss the alleged failure of the deputy chief to follow internal regulations and procedures related to property handling and the hiring of an officer. Writing about matters of internal department policy and procedures, cannot be considered speaking out on matters of public concern. *See Thompson v. Scheid*, 977 F.2d 1017 (6th Cir. 1992). The Petitioner's criticism of the deputy chief for alleged lack of integrity, morals and scruples is a mere airing of personal gripes by an employee and does not rise to the level of a matter of public concern. To hold otherwise, would mean that "virtually every remark — and certainly every criticism directed at the public official — would plant the seed of a constitutional case." *Connick*, 461 U.S. at 149.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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